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IN THE

Supreme Court of the United States

October Term, 1947.

No. 622

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - - Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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February 25, 1948.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Western Union Telegraph Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Sixth Circuit on December 9, 1947 (petition for rehearing denied January 12, 1948, R. 1243), in the above-entitled cause.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, dated December 9, 1947, and not yet reported, is printed at R. 1214. A petition for rehearing was filed on December 29, 1947 (R. 1231), and denied without opinion on January 12, 1948 (R. 1243).

The District Court did not deliver an opinion but made Findings of Fact and Conclusions of Law which are printed at R. 69 and are not yet reported. The judgment of the District Court is printed at R. 88.

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 1213) was entered on December 9, 1947. The petition for rehearing was denied January 12, 1948 (R. 1243). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (43 Stat. 938, Sec. 1; 28 USCA Sec. 347).

STATUTES INVOLVED.

The pertinent provisions of the Fair Labor Standards Act (29 U. S. C. A. §201 *et seq.*) and of the Portal-to-Portal Act (29 U. S. C. A. §251 *et seq.*) are set forth in the Appendix.

SUMMARY STATEMENT OF FACTS.

The suit was filed by the Administrator of the Wage and Hour Division, United States Department of Labor (herein called the Administrator), against the Western Union Telegraph Company (herein called the Telegraph Company) and Bluegrass Hotels, Inc., the Telegraph Company's 9-A agent (a designation hereinafter explained p. 17) at Paris, Kentucky, seeking an injunction against alleged violations of the Fair Labor Standards Act at Paris, Kentucky. Subsequently the Administrator amended his petition to add 14 additional towns in Kentucky where there were 9-A agencies but the 9-A agents in such additional towns were not made parties. During the course of the trial the Administrator again amended his petition by withdrawing therefrom 7 of the 14 towns in Kentucky which had been added to the original petition.

At least as far back as 1931, the Telegraph Company began the installation of 9-A agencies in small towns (R. 805). Competition of long-distance telephone and competition of air mail was resulting in deficit operations in a number of small communities (R. 814). In order to meet this situation and continue to give telegraph service to these small communities, the Telegraph Company evolved the plan of the 9-A agent in small municipalities (R. 813).

That is, instead of the Telegraph Company maintaining its own office with the resulting expense of rent, heat, light, janitor service, payroll, etc., the Telegraph Company turned its business in these small communi-

ties over to some local, already established, business concern with a good location and usually with sufficient personnel on hand to take care of the small amount of telegraph business incident to small municipalities (R. 813). Such already established businesses were hotels, garages, etc.

The advent of the teleprinter shortly prior to that time made these 9-A agencies possible. Under the old Morse code system, the equipment at both the sending and receiving ends of a telegraph line were such that dots, dashes, pauses, etc., were used to transmit the various letters of the alphabet. This required special training and long experience in order that an operator could either send or receive telegraph messages. The teleprinter, on the other hand, resembles and is operated similar to an ordinary typewriter. The teleprinter has a keyboard exactly like a typewriter keyboard. When a telegraph message is to be sent, all that the operator has to do is to type it out on the teleprinter, just as would be the case with a typewriter, and the typewritten message comes out at the receiving office on a thin ribbon of paper which is then pasted on a regular telegraph blank and is ready for delivery. The message also comes out at the sending office on a thin ribbon of paper which can be likewise pasted on a telegraph blank and preserved.

Therefore, almost anyone who worked for a hotel, garage, etc., was competent, with a very little training, to both send and receive telegraph messages (R. 826).

The 9-A agent is paid a commission on gross business and in some cases an allowance for delivering

messages. The rates for sending a telegram from any place to any other place are fixed by tariffs promulgated or approved by the Federal Communications Commission. Neither the Telegraph Company nor any of its employees or agents can charge anyone either more or less than the rate prescribed by the Commission. Such rates covering the entire Country are in printed tariff books which are furnished each 9-A agent and anyone else who sends paid or receives collect telegrams.

The Telegraph Company furnishes a teleprinter, certain other equipment, telegraph blanks, etc. The 9-A agent also furnishes equipment such as tables, chairs, typewriter, etc. The agent also pays the expense of rent, wages, light, heat, janitor service, etc. The agent selects whom he pleases to do the telegraph work. Such work can be done by four employees of the 9-A agent as at the hotel agent at Cynthiana, Kentucky, or principally by one employee as at the garage at Georgetown, Kentucky, or the agent can do the work himself as at Nicholasville and Versailles. (All four of these Kentucky towns were involved in the suit and are covered by the judgment herein.) The Telegraph Company has nothing whatever to do with hiring, firing, or the fixing of wages or hours of the employees of the 9-A agent who do hotel, garage, or other work for the 9-A agent during the same time that they also do such telegraph work as may arise during their respective hours of duty. The agent does the hiring and firing and fixes both the compensation and hours of service of its employees who, as an in-

cidental part of their other duties, also do telegraph work at the same time.

The agents pay, and have always paid, the entire wages or salary of their employees who operate the telegraph equipment at the same time they are attending to the agent's regular business. Such employees of the 9-A agents have always looked solely to the agent for remuneration for services for all work rendered for the agent including the telegraph work.

The Company maintains that the 9-A agents are independent contractors and that their employees who do telegraph work at the same time they are performing the regular work of the 9-A agent are the employees of an independent contractor. The District Court held that the 9-A agents were not independent contractors, but employees of the Telegraph Company and that the employees of the 9-A agents who operated any telegraph facilities were employees of the Telegraph Company.

Following is a brief statement of the facts and practices at each of the 9-A agencies in the order named in the judgment of the District Court.

Cynthiana.

The Cynthiana Hotel Co., a corporation, was 9-A agent from December, 1939 (Plaintiff's Collective Exhibit No. 157), until July, 1946, when the corporation leased the hotel to a partnership of four persons doing business as the Harrison Hotel Co. (R. 1137). The partnership has been agent since July 1, 1946. It is

also the ticket agent for the Greyhound Bus Lines (R. 791).

The teleprinter at all times has been located in the hotel lobby and is now adjacent to the hotel desk where bus tickets are sold.

During the hours of telegraph service, at least four persons, including one of the partners, either alone or two at a time, do the hotel desk work, sell bus tickets, and also the telegraph work.

A Mrs. Renaker, the only local witness introduced by the Administrator, estimated that about 50% of her time was spent on telegraph work and 50% on other work (R. 782). Mr. Willis, the working partner, introduced by the Telegraph Company, estimated that she spent 40% of her time on telegraph work (R. 1141). There was no estimate as to how much time the other three persons who also operated the teleprinter spent on telegraph work or on the hotel, bus, etc., work.

The working partner, Mr. Willis, has done all of the employing, discharging, fixing hours of work, rates of pay, reassignment of hours, and the actual payment of wages. The Telegraph Company has had no part in any of these matters (R. 1138, *et seq.*).

Georgetown.

Mr. L. S. O'Dell has been 9-A agent since October, 1942, under a written contract which is still in effect (R. 1163). At the time he became such agent he was the owner of a garage, had the sales agency for Buick and Pontiac cars and G. M. C. trucks. He was also ticket agent for Southeastern Greyhound Bus Lines, and had a small cigar or confectionery counter

(R. 1163, *et seq.*). When he became bus agent he employed a Miss Green (R. 698, 1164) and when he later became agent for the Telegraph Company Miss Green was able to take on the telegraph work in addition to selling bus tickets and operating the counter (R. 679, *et seq.*, 1166). Mr. O'Dell himself does this work at times (R. 684). All three of these businesses are conducted at a counter at one side of the automobile showroom (R. 678).

The person handling these businesses spends approximately 50% of her time on telegraph work, 40% on bus ticket work and 10% on the cigar counter (R. 1166). The gross revenue per day runs about $15.00 each for the confectionery counter and the telegraph work and $100.00 for the bus ticket agency (R. 679-699, 1166).

Mr. O'Dell employed Miss Green, fixes her rate of pay, has given her raises, pays her (she is actually paid from the bus ticket drawer, R. 676), assigns her hours and otherwise exercises the indices of an employer. The Telegraph Company has had nothing to do with any of these matters (R. 681, *et seq.*, 1164, *et seq.*).

Harrodsburg.

Mr. N. L. Curry, an insurance man, became 9-A agent in May, 1939, and continued until he retired from the insurance business at the end of February, 1943. On March 1, 1943, his insurance partner, J. W. Coakley, became and has continued to be the 9-A agent (Plaintiff's Collective Exhibit No. 161).

The teleprinter is located in the insurance office and and the work has been handled by a succession of stenographer-secretaries (R. 643, *et seq.*). Mr. Coakley has only one employee (R. 646) and spends most of his time away from the office (R. 653, 661). The employee spends less than 75% of her time on telegraph work and more than 25% on insurance work (R. 645, 646). Mr. Coakley would require at least a part-time employee if he did not have the telegraph business (R. 654), and testified that if he did not have the telegraph business (R. 654) it would be good for his insurance business to have someone in the office all the time (R. 646). During the two years Mr. Coakley was in the Army, both the telegraph and insurance businesses were continued in his name (R. 656, 769), and were attended to by his wife and a stenographer-secretary (R. 468).

Mr. Coakley employed all of the stenographer-secretaries, fixed their hours, fixed their salaries, vacations, lunch periods, etc., and paid their salaries from his insurance bank account (R. 654, *et seq.*). He also hires delivery boys and delivers "a lot of them myself" (R. 658). The Telegraph Company has had nothing to do with any of these matters.

Irvine.

Formerly the 9-A agent was a telephone company, then the owner and manager of the Colonial Hotel (R. 795, 1035), and in June, 1946, R. E. McClanahan, manager of the same hotel, became agent (R. 1019) when his father bought the hotel (R. 1034). The

hotel and telegraph businesses are operated as a family partnership, in so far as profits are concerned, as are theaters, a finance company and an insurance agency in Irvine (R. 1017, 1034).

The telegraph equipment is adjacent to the hotel desk and in line with it. The telegraph work is done by McClanahan, his wife and a Miss Henry. Miss Henry attends to hotel desk work, is secretary to McClanahan, and spends about one-third of her time on telegraph work during her tour of duty (R. 1019-1021). She would be required if McClanahan did not have the telegraph agency (R. 1024).

McClanahan is active in a number of civic affairs (R. 1037) in addition to the many family businesses and managing the hotel. He employed Miss Henry, fixes her rate of pay, hours of work, time off, pays her wages, and otherwise exercises all of the indices of an employer (R. 1022, *et seq.*). The Telegraph Company has had nothing to do with any of these matters.

Morehead.

Since November 1, 1945, C. E. Clements, lessee and manager of the Midland Trail Hotel, has been the 9-A agent. The telegraph equipment has been located in the hotel lobby and is now behind the hotel desk (R. 1063-1066).

Clements has had two employees who operate the teleprinter in addition to their hotel desk work. There was no estimate as to the amount of time spent by these persons on telegraph work as compared with hotel desk work. Clements hired these persons, fixes their

hours, rates of pay, and pays them. The Telegraph Company has had nothing to do with any of these matters.

Nicholasville.

Since July 1, 1940, Miss Rose has been the 9-A agent (R. 1208) and also agent for the Railway Express Company (R. 742). She is paid on a commission basis by both companies and owns a truck used for deliveries for both companies (R. 735-736).

For many years previously, her father had operated a Morse telegraph instrument as either employee or agent. In addition, he was agent for the Railway Express Company, representative of an Interurban Railway Company (R. 750) and had an insurance agency. Before retiring on July 1, 1940, he wrote the Telegraph Company requesting that a teleprinter be installed and that his daughter be appointed agent (R. 747-748).

Miss Rose receives $50 to $100 a month (50% commission plus $8.00 delivery allowance) from the Telegraph Company and $60 to $200 a month (10% commission) from the Railway Express Agency (R. 742, *et seq.*). She made no estimate of the allocation of her time between telegraph and express work.

Mr. Rose continues his insurance agency and both the telegraph and express businesses of Miss Rose are in the insurance agency office (R. 756). The building has an insurance sign but Miss Rose has refused to allow any sign pertaining to the Telegraph Company be placed in the office window (R. 758, 761).

In so far as the Telegraph Company is concerned, Miss Rose can do all of the telegraph work herself or can have all or part of it done by one or any number of persons selected by her.

Paris.

On August 2, 1945, the 9-A agency arrangement was discontinued and since that time the Telegraph Company has maintained its own office in Paris with its own employees so that Paris is not really involved, although covered by the District Court's Judgment.

Versailles.

Mrs. E. F. Wooldridge has been 9-A agent since June 5, 1946 (R. 718, 719). At that time she was cashier of the Central Kentucky Natural Gas Company at Versailles (R. 728), is paid a monthly salary by that Company (R. 732) and had considerable spare time (R. 723). The vice president of the Gas Company was glad for her to have additional income (R. 723). The telegraph equipment is located in the Gas Company's office. When Mrs. Wooldridge desires to be away from the office she would "just tell them when I would be back" (R. 729).

In so far as the Telegraph Company is concerned, Mrs. Wooldridge can do all of the telegraph work herself or can have all or part of it done by one or any number of persons selected by her.

The Telegraph Company maintains that the Findings of Fact of the District Court (R. 69) are clearly

erroneous in that they fail to state the actual facts or practices at any of the places named in the judgment. No one can tell from such Findings of Fact whether the agency is at a hotel, garage, etc., or whether the telegraph work is done by the agent personally or by one or what number of employees or what other work the agent or the employees of the agent do at the same time they are doing the telegraph work, such as hotel desk work, selling bus tickets, etc.

The District Court adopted verbatim the "Findings of Fact" that had been submitted by the Administrator (R. 69).

The Telegraph Company has trouble in getting 9-A agents in small towns (R. 829). Such agents are treated even better than customers because it is hard to find a satisfactory agent in little towns (R. 831).

The Telegraph Company has employment standards for its own employees. Applicants prior to being employed must have a high school education; be of certain height; fill out application forms; pass a strenuous physical examination; pass a mental test; be between the ages of 21 and 30 years; the weight must be in line with height or they will not be passed by the medical department. If the above qualifications are met, they are employed and start training in teleprinter operations of from four to six weeks. After such training period, they must attain a speed of 60 messages an hour with not more than two major errors in transmitting and no major error in receiving and gumming 60 messages an hour. After the training

period and tests their efficiency on the teleprinter is checked by monitoring everything they do and all their receipts and charges are checked and audited by the Company's bookkeeping department (R. 834-835).

None of the above standards or tests or training period apply to any 9-A agents or to any of the employees of a 9-A agent (R. 835-836).

The Company has two types of test messages. One type is to test the honesty of the Company's employees. This test message is used primarily for the protection of the public and is filed at the Company's own offices and also at the 9-A agency offices. The other test message is to test the efficiency of the Company's employees; that is, the Company employees are required to do a certain amount of sales work. Thus, if a party files a telegram at a Company office announcing his arrival at a certain town, the Company employee is required to suggest a wire to a hotel for a reservation. Also, if a death message, or a birth, etc., message is sent, such inquiry must be made as to whether or not there is anyone else that should be notified. The object of this class of test message is a service to the customer and additional revenue for the Telegraph Company. This type of sales test message is never sent from a 9-A office (R. 834-838).

ADDITIONAL GENERAL FACTS.

The Telegraph Company desired to place the agencies with established business concerns primarily because of the stability of such an arrangement and also because of their financial responsibility (R. 813, *et seq.*). Other factors concerned were location, employees to handle the telegraph work, hours observed by the business and type of business (R. 828, *et seq.*). In so far as possible, agency arrangements were attempted to be made where the previous employees of the business man had sufficient time to handle the telegraph work without additional hours (R. 306).

The 9-A agent is not required to make any reports or to keep any records except the original copy of sent telegrams, which are retained for six months, pursuant to regulations of the Federal Communications Commission. Operations at all points involved in this case are conducted by teleprinter which is connected by wire to an office of the Telegraph Company known as the "relay" office. This relay office receives and retransmits messages originating at the 9-A office, transmits messages terminating at the 9-A office, and computes the amount which should have been collected by the agent. The "controlling" office bills the agent monthly for the amount which should have been collected, less commissions and allowances (in some cases the agent is billed for the full amount and receives a check for the amount due for commissions and allowances). Money order principal is supposed to be remitted daily by the agent. The term "controlling

office" is used by the Telegraph Company in the sense of "comptrolling office," and relates only to financial matters (R. 1130). In most cases the relay and controlling office are the same, but may be different (R. 1129). The agent customarily keeps revenue from telegraph business in a separate bank account in its or his name, but this is not a requirement of the Telegraph Company according to testimony of the various witnesses (R. 552, 655, 959), and the fact that no such separate bank account was kept at Stearns (R. 994). Money in such separate bank accounts is not subject to the control of the Telegraph Company, or any one except the agent or persons authorized by him.

The agent is bonded when he is an individual and many of the employees of the agents are bonded by the Telegraph Company under a blanket bond with the American Surety Company of New York. By special letters dated October 14, 1938, and July 13, 1944 (R. 1126-1128), the bonding company agreed as to agency risks that "if the agent or an employee of the agent misappropriates money or property and the agent is financially unable to take care of his obligations, such misappropriation is a proper claim under our bond." The telegraph business of an agent is carried on in connection with a "Western Union" sign and the agent generally carries a separate telephone listing of his telephone under the name "Western Union."

The Telegraph Company first installed teleprinters, as they became available, in its own offices (R. 826). Then teleprinters were installed in customers' offices whose telegraph business was large enough to justify

it. These customers are known as "tie-line customers." A "tie-line customer" is a private customer with enough telegraph business to have a teleprinter in his or its own office. The teleprinter is connected with the Telegraph Company's own office. The "tie-line customer" is similar as to training of operators, visits by company representatives, etc., to a 9-A agency, but does not usually accept messages from the public (R. 827).

The Company instituted a program of converting to 9-A operation certain unprofitable and deficit Company offices in small towns where the number of messages, and hence the revenue, was small (R. 827). In 1931, the Telegraph Company asked and received permission from the Georgia Public Service Commission to change Company offices at East Point and Decatur, Georgia, to 9-A agencies, at that time known as 11-B agencies (Defendant's Exhibits Nos. 3 and 4, copied R. 806, 807, 808).

The agent receives considerable mail from the Telegraph Company ranging from specific suggestions to general tariff information. Representatives of the Telegraph Company make visits to the 9-A agencies approximately every six months at which time they may be asked any questions, and at which time they make survey reports with respect to each agency visited.

The designation "9-A" is one of a set of classifications of agencies of various types of the Telegraph Company. Classes 1, 2 and 3 all refer to Company operated offices (Plaintiff's Exhibit No. 20, R. 197).

Classes 4 and 5 refer to operations through an agency at railroad company offices. There are more than 10,000 separate small towns served by railroad offices (Plaintiff's Exhibit No. 5).

The classification 9-B is an agency within a city where there is also a company office, as at hotels. The classification 9-C includes Army and Navy camps and bases which are operated by civil or military employees of the United States Government (Plaintiff's Exhibit No. 20, R. 872) such as the military agencies at Fort Knox, Kentucky, and the Fort Thomas, Kentucky, Army Post (Plaintiff's Exhibit No. 5, R. 873).

The Telegraph Company maintains that the Findings of Fact of the District Court are clearly erroneous in that the few isolated mistakes made at a few of the agencies over a considerable period of years are taken as typical of general conditions. These admitted mistakes are referred to in the footnote of the opinion of the lower court (R. 1217). These admitted mistakes had been rectified long prior to the time of the trial.

QUESTIONS PRESENTED.

(1) Are the above 9-A agents, each of whom has a primary business in addition to the telegraph agency, independent contractors or the employees of the Telegraph Company within the meaning of the Fair Labor Standards Act?

The decision of the District Court and of the Circuit Court in this case that such agents are employees of the Telegraph Company is in direct conflict with

the decision of the Fourth Circuit Court of Appeals in the case of *Blankenship* v. *Western Union,* 161 Fed. 2d 168. The Fourth Circuit Court of Appeals held that such agents were independent contractors and not employees of the Telegraph Company.

(2) Are the employees of the 9-A agents listed above, whose hiring, firing, rates of pay, hours of service, etc., are all done by the 9-A agent and who attend to the primary business of the 9-A agent at the same time they do telegraph work, the employees of such 9-A agent or the employees of the Telegraph Company within the meaning of the Fair Labor Standards Act?

(3) Does the Fair Labor Standards Act give the courts the power to enjoin the Telegraph Company from employing or suffering or permitting any persons (which, of course, includes the employees of any 9-A agent) to operate its telegraph facilities "who *receive* wages for the time required to be present and available for such service as well as actually engaged therein at rates less than * * * " the minimum fixed by the Act?

The Act requires an employer to "*pay*" an employee certain minimum wages.

(4) Does the Portal-to-Portal Act of 1947 withdraw jurisdiction from the courts to grant an injunction against the Telegraph Company where, without contradiction, the evidence showed that the telegraph work involved by the employees of the 9-A agents was not compensable by the Telegraph Company by either an express provision of a contract or a custom or prac-

tice between the Telegraph Company and the employees of the 9-A agents?

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Sixth Circuit Court of Appeals involved herein is in conflict with the decision of the Fourth Circuit Court of Appeals (*Blankenship* v. *Western Union*, 161 Fed. 2d 168, decided April 9, 1947) on the same matter.

(2) The Sixth Circuit Court of Appeals has decided a Federal question in a way that is in conflict with applicable decisions of this Court.

(3) The Sixth Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

CONCLUSION.

For the reasons herein set forth, it is respectfully submitted that the Writ should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

Reference to the opinion of the Circuit Court of Appeals and to the Findings of Fact and Conclusions of Law of the District Court are made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked, is shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, beginning at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 18 and 19 under the heading "Questions Presented."

V.

ARGUMENT.

Point I.

The Decision of the Court Below is in Conflict With the Decision of the Fourth Circuit Court of Appeals on the Same Matter.

The court below held that the 9-A agents involved herein, each of whom had a primary business, and who operated any telegraph facilities or equipment, were employees of the Telegraph Company and not independent contractors under the Act. The court also held that the employees of 9-A agents who attended to the primary work of the 9-A agent during the same hours that they operated telegraph facilities or equipment were employees of the Telegraph Company and not employees of an independent contractor under the Act.

The Fourth Circuit Court of Appeals has held the opposite on the same matter.

Blankenship v. *Western Union,* 161 Fed. 2d 168 (CCA 4); April 9, 1947.

Blankenship and Patrick, a partnership, operated a hotel at Mullens, West Virginia, and were also the Telegraph Company's 9-A agent at that place. They brought suit against the Telegraph Company for a declaratory judgment contending that they were employees of the Telegraph Company under the Fair Labor Standards Act. The District Court (S. D.,

West Virginia) held that members of a partnership are not "employees under the Act" and also that an independent contractor relationship existed (67 F. Supp. 5). On appeal, the Fourth Circuit affirmed and held that a partnership cannot be an employee under the Act and also held that a "stronger reason" for the decision was that the status or relationship between the parties was that of an independent contractor. The Fourth Circuit said:

> "The primary and, of course, most important business of the plaintiffs was the operation of the Guyandotte Hotel, for which the partnership was formed. The telegraph agency was merely one out of a number of incidents of the hotel business.
>
> "The telegraph agency was operated on premises absolutely controlled by the plaintiff. These premises were far removed from defendant, and the office, to which plaintiffs reported and from which they received instructions, was not in Mullens but in Beckley, another town. The daily number of hours worked by the plaintiffs and many details of their work could not be within the first-hand knowledge of Western Union.
>
> "It is clear that the plaintiffs were not required to devote their full and exclusive time to the telegraph agency. Obviously, a great advantage to the plaintiffs was that they could give to the telegraph agency odds and ends of their time, on which the hotel clearly had first call.
>
> "Quite important is it, we think, that the contract does not require that the plaintiffs personally perform the services required for the operation of the agency. The complaint clearly dis-

closes the performance of some of these services by persons hired for that purpose by the plaintiffs.

* * * * * * * *

"Under the contract, plaintiffs were to be compensated on a specified percentage of the receipts of the agency, not by a fixed salary or wages. Plaintiffs further agreed to endeavor to increase the business of the agency. Their compensation thus depended on their own activities and their success. And, under a provision of the contract, the plaintiffs assumed 'all other expenses necessary to properly handle the telegraph company's business.' By the supplemental agreement, a portion of the compensation was allotted to rental charges, the balance was to represent remuneration for services.

"In Paragraph VI of their complaint, plaintiffs assert:

> 'That they are receiving from said respondent, monthly, each for his and her services, *or services performed on their behalf,* to the respondent company, a monthly sum less than that prescribed and set forth by the Fair Labor Standards Act of 1938 * * *.' (Italics Ours.)

"Thus the plaintiffs do not claim that they are receiving for their services less wages than those prescribed by the Act. The allegation is that substandard wages are received *either* for their services *or* for the services of others whom they (not Western Union) have employed. Surely the ambit of the Act cannot properly be stretched to cover the employees of an 'employee,' who are paid by, and subject to the control of, the person who employed them and not the original 'employer.'

* * * * * * * *

"It might be added that the Fair Labor Standards Act was originally intended to regulate minimum wages and maximum hours for wage-earners on a low economic level who needed such protection in order to secure satisfactory labor conditions. Certainly the Act did not contemplate that the employees should be the operators of a business on their own account to which business the services to be rendered to the so-called employer would be merely incidental. Nor was the Act intended to cover contracts between employers or to establish a minimum compensation for services rendered by one employer to another.

"The judgment of the District Court is affirmed."

Thus the Telegraph Company is in a most difficult position. The Fourth Circuit has held that the 9-A agents are independent contractors and that the employees of the independent contractors who also do telegraph work are not employees of the Telegraph Company, but of the 9-A agent. The Sixth Circuit has held exactly to the contrary. The Company's operations are nationwide.

Point II.

The Decision of the Court Below is in Conflict With Applicable Decisions of This Court.

United States v. *Albert Silk.*
Harrison, Collector, v. *Greyvan Lines,* 331 U. S. 704, 67 S. Ct. 1463, decided June 16, 1947.

These two cases involving the collection of Social Security Taxes were decided together. In the Silk

case this Court held that persons who unloaded coal from railroad cars were employees but that truck men who owned their trucks and delivered coal to customers were "independent contractors."

In the Greyvan case this Court held that the truck men were "independent contractors." As to the actual set-up, the control exercised by the Company, the instructions issued by the company, insurance, etc., the opinion states:

> "* * * The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises 'necessary to the operation of the vehicle in the service of the company as a motor carrier under any Federal or State Law' were to be obtained at the company's expense."

In stating the law as to who were employees and who were independent contractors, the opinion reads in part:

"* * * The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. * * * "

"* * * The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. * * *"

* * * * * * * *

"* * * But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Walling, Admr., v. *Portland Terminal Company*, 330 U. S. 148.
Walling, Admr., v. *Nashville, Chattanooga & St. Louis Railway Company*, 330 U. S. 518.

In these two cases, decided the same day, this Court held that railroad trainees who did railroad work but whose employment did not contemplate compensation by the railroad company were not employees within the meaning of the Act. In the Portland case, the opinion states in part:

> "The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See N.L.R.B. v. Hearst Publications, 322 U. S. 111, 128-129. * * *"
>
> * * * * * * * *
>
> "Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation. This is shown by §14 of the Act which * * *. This section plainly means that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum

wage, unless a permit not to pay such minimum has been obtained from the Administrator. * * * "

* * * * * * * *

"* * * The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. * * *"

Boutell v. *Walling,* 327 U. S. 463, February 25, 1946.

This was a suit by the Administrator against two individuals to enjoin them from violating the maximum hours provisions of the Act. The two individuals were members of a partnership of four who did business as F. J. Boutell Service Company. The other two partners were not subject to the jurisdiction of the district court. These four partners were also the sole stockholders of the Boutell Drive-Away Company, a Michigan corporation which was engaged in the transportation of automobiles, etc., in interstate commerce.

The employees of the partnership Service Company were mechanics, engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the corporation Drive-Away Company. In fact, it was stipulated and the trial court found that the partnership Service Company was engaged exclusively in rendering such service to the corporation and that the corporation "is an entity separate and distinct" from the partnership.

Thus the same four individuals owned (a) a corporation that was engaged in the motor transport of goods in interstate commerce and (b) a partnership which did nothing but service the transportation used in interstate commerce.

It goes without saying that since the same four persons owned the corporation and also composed the partnership that there was the same supervision and control over the employees of both.

Although the employees of the partnership did nothing but service the equipment of the corporation, this Court held that the employees of the partnership were not the employees of the corporation.

This is in conflict with the judgment of the court below in the instant case that anyone who worked on the equipment of the Telegraph Company was an employee of that Company notwithstanding that such person was the employee of a bona fide partnership, corporation, or individual.

If four individuals can set up a corporation engaged in motor transportation in interstate commerce and the same individuals set up a partnership whose employees do nothing but work on the corporation's equipment and the partnership employees are held not to be the corporation's employees it necessarily follows that the Telegraph Company can make a good faith independent contractor contract with perfect strangers, *i. e.*, the partnership hotel at Cynthiana, the individual automobile man at Georgetown, etc., and the employees of the independent contractor are not the employees of the Telegraph Company.

It is true that this Court said, in the course of the opinion, that the case was

> "decided upon the basis that the parties have stipulated and the trial court has found that these employees are employees of the partnership, the Service Company * * *."

Each and every one of the employees of any 9-A agent involved herein are the bona fide employees of such agent and attend to the primary work of that agent.

Furthermore, since the employees themselves could not stipulate or contract or waive their rights (*Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697), it necessarily follows that counsel could not stipulate away nor the district court "find" away their rights.

Point III.

The District Court Was Required to Amend the Act in Order to Write Its Judgment (R. 88) Which Was Affirmed by the Circuit Court.

The pertinent part of the judgment is as follows:

> "* * * the defendant, Western Union Telegraph Company, its officers * * * be and they hereby are permanently enjoined and restrained from violating the provisions of Sections * * * of the Fair Labor Standards Act * * * hereinafter referred to as the Act, at Cynthiana, Georgetown, Harrodsburg, Irvine, Morehead, Nicholasville, Paris and Versailles, all in the State of Kentucky, in that:
>
> "(1) The Western Union Telegraph Company shall not employ or suffer or permit to be

> employed, in the operation or for the purpose of operating defendant's facilities or equipment used in carrying on its telegraph business at the above places, any persons who *receive* wages for the time required to be present and available for such service as well as actually engaged therein, at rates less than * * *" the minimum fixed by the Act.

There was a similar provision as to hours of work and the keeping of records.

The Act requires an employer to "*pay*" an employee certain minimum wages. The judgment enjoins the Telegraph Company from permitting anyone to operate its facilities "who *receive* wages for the time required to be present and available for such service as well as actually engaged therein at rates less than * * *" the minimum fixed by the Act.

The court recognized that the Telegraph Company could hardly be required to "*pay*" the partner and the three hotel clerks at Cynthiana and Miss Green at Georgetown, etc., for time spent on hotel, bus ticket, garage, etc., work. At any rate the court changed the requirement of the Act, and we submit, changed the purpose and intent of the Act as well, when it enjoined the Telegraph Company from permitting any persons "to operate its facilities who 'receive' " less than the minimum.

None of the 9-A agents "receive" wages from anyone at any time. Each is engaged in a primary business and makes profits or suffers losses from such primary business.

Point IV.

Effect of the Portal-to-Portal Act.

Section 2(d) of the Portal-to-Portal Act of 1947 withdraws the jurisdiction of courts of the United States from any action or proceeding to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of that Act. The statement of the managers on the part of the House made it clear that the words "any action or proceeding" include injunctions.

The activity of the employees of the 9-A agents during such time as they are performing telegraph work has never been compensable by the Telegraph Company by either an express provision of a written or nonwritten contract or a custom or practice between such employees of 9-A agents and the Telegraph Company. No contract exists between the Telegraph Company and the employees of the 9-A agents and the Telegraph Company does not make payments to employees of the 9-A agents, directly or indirectly, as compensation for their activity in doing telegraph along with their other duties for the 9-A agents.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Excerpts From the Fair Labor Standards Act.

29 U. S. C. A. 206.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title,

(5) * * *"

(June 25, 1938, c. 676, §6, 52 Stat. 1062; June 26, 1940, c. 432, §3 (e), (f), 54 Stat. 616.)

29 U. S. C. A. 207.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *"

(June 25, 1938, c. 676, §7, 52 Stat. 1063, as amended Oct. 29, 1941, c. 461, 55 Stat. 756.)

29 U. S. C. A. 215.

"(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

* * * * * * * *

"(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

* * *"

(June 25, 1938, c. 676, §15, 52 Stat. 1068.)

29 U. S. C. A. 217.

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, sec. 381), to restrain violations of section 215 of this title. June 25, 1938, c. 676, §17, 52 Stat. 1069."

Excerpts From the Portal-to-Portal Act of 1947

29 U. S. C. A. 251.

Part I

Findings and Policy

"Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices

would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and

obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Part II

29 U. S. C. A. 252.

Existing Claims

"Sec. 2. Relief from Certain Existing Claims Under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

* * *"

(Act of May 14, 1947, c. 52, 61 Stat. 84-85.)

FILED

IN THE

Supreme Court of the United States

October Term, 1946.

WESTERN UNION TELEGRAPH COMPANY, Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

REPLY BRIEF FOR PETITIONER.

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March 25, 1946.

WESTCOTT-BAUM CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 622.

WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, - *Respondent.*

REPLY BRIEF FOR PETITIONER.

Our petition is based primarily upon the conflict between the decision of the Sixth Circuit Court of Appeals in the instant case with the decision of the Fourth Circuit Court of Appeals in the case of *Blankenship* v. *Western Union,* 161 Federal 2d 168.

The Fourth Circuit Court of Appeals in the *Blankenship* case held that 9-A agents of the Telegraph Company were independent contractors and not employees. The Sixth Circuit Court of Appeals in the instant case held that the 9-A agents and the employees of the 9-A agents were not independent contractors, but employees of the Telegraph Company.

Obviously there could not be more of a direct conflict between decisions of Circuit Courts of Appeals than where two Circuit Courts of Appeals arrive at opposite decisions as to the same Company and the same agency relationship.

Respondent's brief attempts to belittle the decision in the *Blankenship* case.

1. At pages 16-17 respondent's brief claims that the decision in the *Blankenship* case was rendered prior to the decisions of this Court in *Harrison* v. *Greyvan Lines,* 331 U. S. 704; *United States* v. *Silk,* 331 U. S. 704; and *Rutherford Food Corporation* v. *McComb,* 331 U. S. 722.

Petitioner asserts that the decisions of this Court in these three cases are not contra to the decision in the *Blankenship* case. On the contrary, petitioner relies on these three cases from this Court as supporting petitioner's position and the decision of the Fourth Circuit Court of Appeals in the *Blankenship* case.

2. Respondent's brief (footnote, p. 17) goes outside of the Record to state that "the Administrator was not advised of the date of the argument of the appeal[1] until it was too late to present his views to the appellate court." On account of respondent's departure from the Record, we know we will be excused for also going outside of the Record to state that prior to the argument in the *Blankenship* case the Administrator filed a motion in the Fourth Circuit Court of Appeals for leave to file a brief as *amicus curiae.* In this motion the Administrator stated:

---

[1]In the Blankenship case.

"The issues raised in this case, relating to the existence of an employment relationship under the Act, are similar or closely related to those pending before the Circuit Court of Appeals for the Sixth Circuit in the case of *Western Union Telegraph Company* v. *Walling,* No. 10422, in which judgment was entered for the Administrator in the District Court for the Eastern District of Kentucky."[2]

3. Respondent's brief attempts to show that the facts in the instant case are different from the facts in the *Blankenship* case.

This depends upon whether the applicable facts in the instant case are those that existed at the time of the trial and for a long time prior thereto or a few mistakes made at the three Kentucky towns of Paris, Morehead and Versailles which had been corrected.

Appellant's brief nowhere claims that the facts stated in our petition (pp. 6-12) as to each of the seven Kentucky towns named in the judgment of the District Court are inaccurate in any respect. These facts show a bona-fide independent contractor relationship exactly as the relationship in the *Blankenship* case.

Unless the few admitted but rectified mistakes at Paris, Morehead and Versailles are held to be Telegraph Company general policies, there are no differences between the facts in the *Blankenship* case and the facts in the instant case.

[2]An attested copy of this motion was filed with the Clerk of the Sixth Circuit Court of Appeals.

We will not go through respondent's brief to point out that what are alleged to be Telegraph Company general policies are in fact only the admitted but rectified mistakes at the three towns named.

In the footnote at page 16 of respondent's brief it is stated that the injunction "makes petitioner responsible only for the time the employee is * * *." Such responsibility is also provided for by the Act if there is an employer and employee relationship. The Act provides "every employer shall pay to each of his employees * * *."

However, the injunction in the instant case actually imposes no responsibility for payment on the Telegraph Company. The court recognized that both the 9-A agents and their employees attended to the primary work of the 9-A agent. The injunction is against the Telegraph Company allowing anyone to operate its facilities who "receives" less than the minimum of the Act. Thus the court amended the Act and changed its meaning and effect.

Respectfully submitted,

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INDEX

CITATIONS

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OCTOBER TERM, 1947

No. 622

WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 69–88) are not yet officially reported. The opinion of the Circuit Court of Appeals (R. 1214–1229) is reported at 165 F. 2d 65.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1947 (R. 1213). The petition for certiorari was filed February 24,

1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether persons engaged in operating petitioner's telegraph equipment and performing other services necessary to the conduct of petitioner's telegraph business at branch "agency offices" located on premises not owned or leased by petitioner are "employees" of petitioner within the meaning of the Fair Labor Standards Act.

2. Whether Section 2 of the Portal-to-Portal Act of 1947 relieves petitioner from liability under the Fair Labor Standards Act and withdraws the jurisdiction of the courts in the present case.

STATUTES INVOLVED

The statutory provisions involved are Sections 3 (d), 3 (e), 3 (g), 6 (a) (3), 7 (a) (3), 11 (c), and 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Sections 1 (a), 2 (a), 2 (b), 2 (d), and 13 (a) of the Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st sess. These sections are printed as an appendix to this brief.

STATEMENT

The comprehensive findings of fact by the trial court (R. 69–88), fully concurred in by the Circuit Court of Appeals (R. 1214–1215), state

in detail the pertinent facts. Since petitioner's "Summary Statement" admittedly ignores the findings concurred in by the two courts below (Pet. 12–13, 18),[1] the following summary of the findings of fact and the supporting evidence is more detailed than might otherwise be deemed appropriate in response to a petition for certiorari.

1. *Establishment of agency offices.*—Petitioner, Western Union Telegraph Company, is a New York corporation having its principal office at New York City, New York, and branch offices and places of business throughout the United States (Fdg. I, R. 69). This case is concerned with eight of petitioner's offices located at various Kentucky towns. It is not denied that petitioner conducts an interstate and worldwide telegraph communications business. Prior to the period in the complaint, Western Union maintained and operated regular Company offices employing persons who were admittedly its employees at each of the eight towns (Fdg. V, R. 70, 71, 113, 114). Beginning shortly before the effective date of the Fair Labor Standards Act of 1938, petitioner entered into an intensive program to convert many of its company offices located in small towns into so-called agency offices, originally designated as 11–B and later 9–A offices (Fdg. IV, R. 70, 118–120).

[1] As in the Circuit Court of Appeals, petitioner contends that "the 'Findings of Fact of the District Court' are clearly erroneous" (Pet. 12–13, 18). The court below rejected this contention (R. 1215).

Pursuant to this program the company offices in each of the towns here involved were designated "agency" offices before commencement of suit, and, with one exception, continued as such until the trial of this case (Fdg. V, R. 70–71). The chief purposes of converting these "company offices" into "agency offices" were to save money by reducing expenses, principally wages, and to increase revenues by extending the hours of service (Fdg. IV, R. 70, 168, 201–203, 271–274).

Petitioner presumably entertained the theory that the application of the minimum wage and overtime provisions of the Fair Labor Standards Act could be avoided by having its telegraph business carried on by establishments engaged in some other independent enterprise (Fdg. VII, IX, R. 71, 72). Consequently, it was the practice of Western Union to designate such an enterprise as its agent (*Ibid.*). However, in several instances, telegraph offices were designated agency offices although they were operated by individuals devoting their time to Western Union business in substantially the same manner as employees at company offices. At times, the Company designated a wholly fictitious business enterprise as agent, when the true agent actually had no independent business but devoted his full time to Western Union business (Fdg. IX, R. 72). Occasionally, an individual who himself performed all the telegraph work was designated agent (R.

732, 740). In other instances an agent was designated who was expected to have others perform the work (R. 329, 652, 1162, 1163, 1063, 1032, 1137). In all cases whether the agents themselves acted as operators or selected others to do this work, the operators spent a substantial amount of time in performing telegraphic services (R. 676, 773, 791, 1021, 1067, 1141). Moreover, it was necessary that someone be available at the agency offices to render Western Union service at all times during the established hours of service (Fdgs. VI, XV, R. 71, 75–76).

Payment of the operators at the agencies assumed various forms. Record agents who devoted all or part of their time to Western Union work received their compensation directly from the Company (R. 634, 636–637, 730, 732). In some instances, however, Western Union checks payable to record agents, with the knowledge of petitioner, were indorsed over to individuals whose entire time was spent in operating Western Union's equipment (R. 618, 666–667). In other instances the 9–A agents received checks from Western Union, and paid the individual operators fixed wages (R. 676, 767, 778, 601–602, Fdg. XXVII, R. 84).

2. *Integration of agency offices with Western Union operations.*—Notwithstanding some differences in the nature of the agent, the agency offices involved in this action all operate in the same

manner and the individuals who perform the telegraphic services stand in virtually the same relationship to petitioner as employees in Western Union company offices (Fdg. VIII, R. 72, 245–247). In the majority of cases the agency offices were established on the basis of a simple oral understanding between petitioner and the "agent" that for an agreed commission, expense and delivery allowance, the "agent" would conduct Western Union's business in accordance with Company rules and regulations, and would maintain certain published hours of service (Fdg. VI, R. 71) which were longer than those previously maintained by petitioner at its Company offices (Fdg. IV, R. 70, 168, 169, 201). This agreement made no mention of the period of time for which it was to be in effect and did not provide that notice by either party was necessary to terminate the arrangement (Fdg. VI, R. 71, 546, 629, 642, 731). The designated 9–A agents could be removed at will and without notice (Fdg. VI, R. 71, 629, 568, 668).

Petitioner furnishes all equipment necessary to handle the telegraphic business (Fdg. X, R. 73, 165, 166). The equipment remains the property of Western Union and "is installed, moved when necessary, regularly inspected, maintained and repaired by the Company" (Fdg. X, R. 73). By means of the Western Union equipment each agency office is in continuous communication with

the Western Union relay offices and agency "operators are directed to call on the relay office for instructions in handling any matter with which they are not familiar" (Fdg. XVII, R. 79, 615).

All bookkeeping and accounting with respect to all transactions at the agencies are done by the company at its relay offices and the agencies are held accountable for charges as computed by the relay office (Fdg. XIII, R. 75, 155). All billing and collecting on agency charge and telephone accounts are done by the relay office (Fdg. XIII, R. 75, 155). Prior to the commencement of this action, petitioner required its 9–A agents at the end of each month to transmit their gross receipts (as computed by petitioner's relay office) to the relay offices where commission and expenses were computed and remitted the 9–A agent.

3. *Supervision and control of agency offices and personnel by Western Union.*—Western Union maintains continuous, direct and comprehensive supervision and control of the agencies. The agency offices are under direct and immediate supervision of Western Union's regional managerial officers (R. 800–803, 245–247, 260–262). As found by the trial court, "for all practical purposes, other than the direct hiring and firing of personnel employed by the agents and direct payment of salaries to some of such personnel, the Company's relation to the agencies has been and is substantially the same as it was before

the conversion was effectuated." (Fdg. VIII, R. 72, 1216.) When the agency is first established, a Western Union instructor is assigned to educate personnel in the use of Western Union equipment and the details of all applicable routines, rules and regulations (Fdg. XVII, R. 77–79, 593, 605–606, 625–627). The initial instruction period is followed up by regular supplementary instructions and regular visits by Western Union representatives (Fdg. XVII, R. 77–79, 256, 275–278, 280).

The Company exercises complete control over the finances of the agencies. It exercises close supervision over the handling and transmission of money order principal, funds received for the transmission of messages, and the extension and continuation of credit to the agencies and their customers (Fdg. XX, R. 80–81, 156–157, 159, 160, 161). The agencies are required to secure petitioner's prior authorization before extending credit to customers (R. 159, 160, 161).

The Company also controls the hours of service of the agency personnel. Petitioner required a prospective agent to agree, as a condition to being designated agent, to maintain at least the daily hours of service prescribed in the Company's published tariffs, as well as the Sunday and holiday hours being observed by Western Union (Fdg. XV, R. 75–76), and "longer hours if possible" (R. 169). The Company consistently resisted any attempts by the agents to reduce

their hours of operation (R. 169). The agencies were not authorized to reduce hours of service, or vary from the published hours even temporarily, without Company permission (Fdg. XV, R. 76). Agencies failing to maintain the prescribed hours were threatened with termination of the agency (R. 169, 170, 330–331).

The supervision and control of petitioner also includes active participation, directly as well as indirectly, in personnel matters of the agencies. Although the agencies have authority to hire and fire, petitioner also makes suggestions to the 9–A agent with respect to the hiring of specific individuals and on occasion has issued instructions to prevent the employment of a particular person by the agent (Fdg. XXI, R. 82, 416, 333, 334). Complaints with respect to violations of State wage and hour laws by agency personnel are also dealt with directly by the Company (Fdg. XVIII, R. 79–80, 336–338).

All individuals at the agencies handling funds derived from petitioner's business are required to submit applications for bond which designated them interchangeably as the "agent" or "employee" of petitioner who, in turn, is designated as "employer" and beneficiary of the bond (R. 141–147, 152). The same form of bond application is used by petitioner in bonding its admitted employees (R. 143). Premiums on the bonds are paid by petitioner (R. 150). For social security tax purposes, the Treasury Department ruled that

the 9–A agents and others employed at the agency to operate petitioner's facilities were employees of Western Union (Pltf.'s Ex. No. 81, R. 295–300). Petitioner's interpretation of the ruling, contained in an extensive memorandum to its Superintendents and District Superintendents (Pltf.'s Ex. 81, R. 295–300), was that the compensation paid the 9–A agents "shall be treated as wages for social security, income tax and Victory tax purposes, effective with payment of compensation for the month of January, 1943" (R. 295). Thereafter petitioner paid social security taxes on its 9–A agents (Fdg. XII, R. 74) but not on other employees at the agencies (R. 225, 295–300).

4. *Investment, risk, and opportunity for profit or loss.*—Western Union made all the investment in facilities to conduct the telegraph business at the agency offices, assumed all risks of the business, and controlled opportunities for profit or loss of the agent by fixing charges and engaging in its own business promotion. All expenses of operating the agency, at first directly and later indirectly, were borne by the Company (Fdg. XII, R. 74, 258, 259–260, 296–297, 432).

The agency offices have little or no opportunity to influence profit or loss by their own efforts. The Company controls the earnings of the agents by controlling the charges. The agents are paid a commission on the proceeds received from transacting Western Union business, plus a delivery allowance (Fdg. XVI, R. 76–77).

The Company takes the initiative in stimulating business by having its own representatives, who make periodic visits to the agency offices, call upon the business concerns in the vicinity, call their attention to the hours of service of the agency and advise them of economies that may be effected by using Western Union service. They also invite customers to use the facilities at the agency office on credit and leave credit cards to facilitate their taking advantage of this offer (R. 252, 442–444, 161–162). The Company also assumes all the risks of the business. It assumes full responsibility for claims for damages arising out of the transaction of Western Union business at the agency (Fdg. XIX, R. 80, 175). It assumes the risk of credit extended to customers (Fdg. XX, R. 80, 172–173, 243). Collection of delinquent accounts is undertaken directly by the Company (Fdg. XVIII, R. 79).

5. *Non-Compliance with requirements of Act.*— It is not disputed that the persons employed at the various agencies have not been compensated in accordance with the minimum wage and overtime requirements of the Act (Fdgs. XXVIII, XXIX, R. 84, 602, 778, 794).

RULINGS OF COURTS BELOW

The district court concluded that an employment relationship, within the meaning of the Act, existed between petitioner and the persons conducting the Western Union business at the

agencies, and that violations of the Act resulted from their failure to be paid in accordance with the minimum wage and overtime requirements of the Act for the conduct of Western Union business (R. 86–87).

The Circuit Court of Appeals, concurring in the findings of the District Court, affirmed. The court further held that the Portal-to-Portal Act of 1947, enacted subsequent to the district court's decision, has no bearing on this case. (R. 1228–1229.)

ARGUMENT

1. *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, *United States* v. *Silk*, 331 U. S. 704, and *Harrison* v. *Greyvan Lines*, 331 U. S. 704, establish the correctness of the decision below. Petitioner's attack on the decision below is essentially that the findings of fact are "clearly erroneous" (see Pet., pp. 12–13, 18). The petition in effect requests this Court to go behind the concurrent findings by two courts and to reexamine an extensive record of oral as well as written evidence, much of which called for the trial court's judgment on the credibility of witnesses and the weight to be given their evidence. See *Anderson* v. *Abbott*, 321 U. S. 349, at 356; see also *United States* v. *O'Donnell*, 303 U. S. 501, 508; cf. *United States* v. *Silk*, *supra*, at 716–717; *United States* v. *United States Gypsum Co.*, No. 13, October Term, 1947, decided March 8, 1948. As is demonstrated by the facts set forth in our

Statement, *supra*, and in the opinion below (R. 1215), the findings in all substantial respects are supported by ample evidence and cannot be shown to be "clearly erroneous."

The findings established the presence in this case of all of the significant factors which this Court has regarded as indicative of an employment relationship and virtually none of the indicia of an independent contractor. The agency offices are completely integrated with Western Union's system, and "for all practical purposes, * * * the Company's relation to the agencies has been and is substantially the same as" the Company's relationship to regular Company offices (Fdg. VIII, R. 71–72). None of the 9–A agents makes any investment in the Western Union business or assumes any risk. All equipment and supplies, including teleprinters, typewriters, counters, safes, and even pencils, are furnished by petitioner, and all equipment is installed and maintained by petitioner at no cost to the agency (Fdg. X, R. 73). Even the boners who owned their knives, meathooks, and belts in the *Rutherford* case, and the unloaders who owned their own picks and shovels in the *Silk* case, both of which groups this Court held to be employees and not independent contractors under the Fair Labor Standards Act and the Social Security Act, respectively, made a greater investment in tools and equipment than do petitioner's 9–A agents.[2]

[2] In addition, petitioner reimburses the agency for items of fixed expense such as rent, phone, lights, heat, power (Fdg.

The nature and degree of control exercised by petitioner over the agency offices is also plainly characteristic of an employment relationship, not of an independent enterprise. Petitioner not only had continuously "kept close touch" on the agency activities (cf. *Rutherford* case, *supra,* at p. 730), and not only is "in a position to exercise all necessary supervision" (cf. *Silk* case, *supra,* at 718), but "has effectively prescribed not only the broad terms and conditions of work at the agencies, but has, as well, directed the minutiae of daily activities." (See Fdg. XIV, R. 75.)

Unlike a genuine independent contractor, petitioner's 9–A agents have no opportunities for increasing their profits by their own initiative and are not subject to any losses in their performance of Western Union's business. In operating the agency offices, the 9–A agent clearly is not engaged in an independent telegraph business. The agencies simply take such business as comes to an ordinary Western Union office or such business as the Western Union representatives send to them or permit them to take. For this they are paid a stipulated commission plus a delivery

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XII, R. 74). See *Walling* v. *Twyeffort*, 158 F. 2d 944 (C. C. A. 2), certiorari denied, 331 U. S. 851, holding that outside tailors who owned their equipment and furnished their own workshops, but who were reimbursed monthly for rent and other expenses incurred in maintaining their shops, were employees within the meaning of the Fair Labor Standards Act.

allowance, an arrangement "more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (*Rutherford Food Corp.* v. *McComb, supra,* at 730). The profits of the agencies depend even less upon efficiency and independent initiative than did the profits of the boners in the *Rutherford* case. The agencies' risk of loss corresponds to its lack of opportunity for profit. Petitioner, not the agency, assumes all the risk, even liability arising out of faulty transmission of messages by the agents (see Statement, *supra,* 11).

Considering "the total situation," not only has petitioner retained the investment, control, and entrepreneurial risk "characteristically associated with the employer-employee relationship" but the personnel conducting Western Union business at these agencies "as a matter of economic reality are dependent upon the business to which they render service." See *Bartels* v. *Birmingham,* 332 U. S. 126, 130. Here, as in the *Rutherford* case, "the work done, in its essence, follows the usual path of an employee" and "putting on an 'independent contractor' label does not take the worker from the protection of the Act" (see *Rutherford* opinion, at p. 729). The *Rutherford* case establishes that in such circumstances an employer cannot escape responsibility under the Act by

interposing an intermediary to whom the authority to hire and fire and pay wages is delegated.[8]

2. Petitioner's reliance on an asserted conflict between the decision below and that of the Fourth Circuit Court of Appeals in *Blankenship* v. *Western Union Telegraph Co.*, 161 F. 2d 168, fails to take into account the decisions of this Court subsequent to the *Blankenship* decision, as well as other significant factors which differentiate the two cases. As pointed out by the court below (R. 1227), the *Blankenship* case was decided prior to the decision of this Court in *Rutherford Food Corp.* v. *McComb, supra; United States* v. *Silk, supra; Harrison* v. *Greyvan Lines, supra.* The *Blankenship* decision rested, in part at least, on factors which this Court's subsequent decisions held of little or no significance; and the circumstances of the *Blankenship* case clearly differentiate it from the instant case.

[8] Petitioner's objection to the use of the word "receive" in the injunction (Point III, Pet. pp. 31–32) is plainly without merit. The injunction by its terms makes petitioner responsible only for the time the employee is "required to be present and available for" or is "actually engaged in" carrying on the telegraph business (R. 89). That the differentiation which petitioner makes between the word "pay" and the word "receive" was not contemplated by Congress is evident from the use interchangeably of these words in Sections 6 and 7 of the Act. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 408, holding that the tips received by redcaps from customers of the Terminal Company may be credited against the minimum wage which the Act requires that employees "receive."

As the court below observed, the *Blankenship* case had come to the circuit court of appeals "in an unusual course" (R. 1227). It was a declaratory judgment action brought by the partnership "agency."[4] The case was decided on a motion to dismiss the complaint which did little more than set forth the contract between the partnership and Western Union. There was no trial and no comprehensive presentation of "the circumstances of the whole activity" (*Rutherford* case, *supra* at 730) or evidence relating to "the total situation, including the risk undertaken, the control exercised, [and] the opportunity for profit from sound management" (*Silk* case, *supra* at 719), which this Court has held most significant in determining the nature of the relationship. The complaint did not allege a close integration of the agency operations with Western Union's communication system, nor a detailed and direct supervision and control of all aspects of the agency's operations, nor did it allege a substantial investment in equipment by Western Union and complete lack of investment by the partnership, a complete assumption of responsibility and risk by

[4] The reason for the institution of a declaratory judgment proceeding instead of an action under Section 16 (b) of the Fair Labor Standards Act does not appear. The complaint in the *Blankenship* case was filed on December 12, 1945, five months after the Administrator instituted proceedings in this action. The Administrator was not advised of the date of the argument of the appeal until it was too late to present his views to the appellate court.

Western Union, nor the various other factors relevant to the existence of an employment relation which the district court found as a fact to exist in the instant case. Thus, on appeal, the only available information relevant to the employment issue was the complaint and the contract.

In the instant case, on the other hand, there was a full trial, and on the basis of extensive evidence the trial court made detailed comprehensive findings of fact on every aspect of the operation of the agency offices and their relationship to petitioner. Both courts below have concurred in these findings. Thus the conflict would exist only upon petitioner's assumption that the findings of fact in the instant case are "clearly erroneous." As pointed out, *supra,* p. 1, fn. 1, there is no basis for indulging this assumption.

Moreover, a number of the factors which the *Blankenship* opinion characterized as "determinative" have since been held by this Court not to be of particular significance, such as lack of control over hours and details of work (*Rutherford Food Corp.* v. *McComb, supra; United States* v. *Silk, supra;* see also *Walling* v. *American Needlecrafts, Inc.,* 139 F. 2d 60 (C. C. A. 6)); lack of control over the premises on which the work is performed (*Bartels* v. *Birmingham, supra;* see also *Walling* v. *American Needlecrafts, Inc., supra; Walling* v. *Twyeffort Co., Inc., supra*); the fact that the agents were not required to devote full and exclusive time to the work of the agency (see *United States* v. *Silk,*

supra; see also *Walling* v. *American Needlecrafts, Inc., supra; Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (C. C. A. 6); *Walling* v. *Twyeffort Co., Inc.,* supra); that the agents could hire employees and were not themselves personally required to perform the services for the agency operations (see *Rutherford Food Corp.* v. *McComb, supra*); and that the agents were paid on the basis of the traffic handled and not by a fixed salary or wages (*Rutherford Food Corp.* v. *McComb, supra; United States* v. *Rosenwasser,* 323 U. S. 360; *Walling* v. *American Needlecrafts, Inc., supra*).

3. The court below correctly held that Section 2 (d) of the Portal-to-Portal Act of 1947 has no application to this case (R. 1228–1229).[5] Section 2 of the Portal Act provides that no employer shall be subject to any liability or punishment for failure to pay an employee for an activity "engaged in prior to the date of the enactment of this Act, except an activity which was compensable" by either a contract in effect between such employee and his employer or by "a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed."[6]

[5] The petition makes the Portal Act point only with respect to the employees engaged to assist the 9–A agents. Petitioner apparently concedes that the Portal Act has no bearing on the injunction issued by the lower court as it relates to those 9–A agents who are themselves engaged in the operation of Western Union equipment.

[6] Since this section of the Portal Act limits liability under the Fair Labor Standards Act, it would seem that it should

Petitioner apparently assumes, for purposes of this point, that it was the employer of the agency personnel, and argues that under the Portal Act it is relieved of liability to those engaged by the 9–A agents because it had no contract, practice, or custom to pay them. Thus petitioner's contention, in effect, is that under the Portal Act an employer is relieved of the obligations imposed by the Fair Labor Standards Act if the arrangements for compensating his employees are made by someone else. Neither the statutory language nor the purposes of the Portal-to-Portal Act lend any support to this contention.

The activities of the agency employees were clearly "compensable," by contract as well as by custom or practice in effect at the establishments where they worked. The contracts pursuant to which these employees were paid can properly be considered as contracts between these employees and petitioner. The agents with whom petitioner had contracts to pay for the telegraph services plainly acted "directly or indirectly in the interest" of petitioner in hiring and contracting to compensate the other personnel (see Section 3 (d) of the Fair Labor Standards Act). Congress made it clear that in enacting the Portal Act it had no intention of modifying the scope of employment under the Fair Labor Standards Act.

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be construed to apply only to those "plainly and unmistakably within its terms and spirit." See *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; cf. *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337, 340–341 (C. C. A. 6).

Section 13 (a) of the Portal Act specifically provides that the term "employer" and "employee" when used in relation to the Fair Labor Standards Act shall have the same meaning as when used in that Act.[7] Consequently, if the courts below have correctly held that an employment relationship exists between petitioner and the employees at the agency offices, it follows that the contracts under which they have been compensated may be deemed to have been made on behalf of petitioner as employer. Moreover, whether or not there were contracts between the employer and the employees to pay for these activities, there was clearly a custom or practice at the establishments to pay for them, and the Portal Act does not require that this custom or practice be between the employer and the employee. Section 2 (a) (2).

Wholly apart from the fact that the activities of the employees here may properly be considered compensable under contract, custom or practice and therefore outside the literal terms of the Portal Act, petitioner's construction of Section 2 of the Portal Act would result in a serious distortion of the legislative purpose. That purpose, as is apparent from the background of the statute, its legislative history, and the statutory language it-

[7] Section 13 (a) provides: "When the terms 'employer,' 'employee,' and 'wage' are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938."

self, is not to permit employers to shift liability under the Act for clearly compensable activities, but to relieve employers of liability for particular kinds of activities which were not thought to be compensable at all, such as portal-to-portal and other comparable activities. The Portal Act was not intended to change the established law that an employer cannot escape responsibility under the Act by contracting that someone else shall be responsible. Cf. *Rutherford Food Corp.* v. *McComb, supra; Southern Ry. Co.* v. *Black,* 127 F. 2d 280 (C. C. A. 4); *Bartels* v. *Birmingham, supra* The immediate and primary reason for its enactment was to deal with the problems arising out of lawsuits filed after the decision in *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680. This is reflected in the findings and statement of purposes in Section 1 (a) of the Act, as well as in the legislative history. See S. Rept. No. 48, 80th Cong., 1st sess., pp. 3–4; H. Rept. No. 71, 80th Cong., 1st sess., p. 3.[8] Neither in the committee reports nor in the debates is there any indication that the Portal Act was intended to permit an employer to escape liability for compensable work performed under the Fair Labor Standards Act.

[8] H. Rept. No. 71, 80th Cong., 1st sess., pp. 2–6; S. Rept. No. 48, 80th Cong., 1st sess., pp. 1–41. See also, the remarks of Congressman Gwynne, author of the House bill, 93 Cong. Rec. 1492 (1947), and the remarks of Senator Donnell, who had charge of the measure on the Senate floor, 93 Cong. Rec. 2086–2098 (1947).

An additional reason why Section 2 of the Portal Act has no applicability here, as the Court of Appeals correctly pointed out, is "that the Wage and Hour Administrator is not seeking to subject an employer 'to any liability or punishment' under the Fair Labor Standards Act, but is seeking to prevent future violations of the act, * * *" (R. 1229). There is no basis either in its language or history for the contention that Section 2 was intended to apply to an injunction proceeding the only purpose of which is to restrain future violations. Petitioner relies on the Conference Report which indicates that the denial of jurisdiction in Section 2 (d) is applicable to actions for an injunction (Pet. p. 33). But this Conference Report statement plainly refers to an injunction proceeding only "*to the extent* that such action or proceeding seeks to enforce any liability or impose any punishment *with respect to a past activity* * * *" (H. Rept. No. 326, 80th Cong., 1st sess., p. 11; italics supplied). Since petitioner does not suggest that its practices changed subsequent to the enactment of the Portal Act and since the contrary is evidenced by the stay of the injunction pending final disposition of the case by this Court, its reliance on Section 2 of that Act, which deals only with past claims, is plainly misplaced.[9]

[9] The reasons for remanding *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 795, and *Alaska-Juneau Gold Mining Co.* v. *E. E. Robertson*, 331 U. S. 793 (both remanded, June 16,

Where, as here, the defenses provided by the Portal-to-Portal Act are plainly inapplicable, this Court has found no occasion to grant review on this ground. See *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, petition for rehearing denied October 13, 1947; *Bibb Mfg. Co.* v. *McComb,* October Term 1947, No. 495, petition for certiorari denied, February 16, 1948.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MARCH 1948.

1947), for consideration by the district courts of Portal Act defenses do not apply in the instant case (1) because those cases were suits by employees on claims for past liability, whereas this action by the Administrator seeks only prospective relief, and (2) the availability of defenses urged under Sections 9 and 11 of the Portal Act in those cases depended upon consideration of evidence not yet in the records, whereas only a purely legal question of the interpretation of Section 2 of the Portal Act is involved in the instant case and the record before this Court suffices to show the inapplicability of the asserted defense.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201:

SEC. 3. As used in this Act— * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in

commerce or in the production of goods for commerce— * * *

(3) For a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

* * * * *

Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st Sess.:

SEC. 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary

collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards

Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * *

SEC. 2. Relief From Certain Existing Claims Under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity,

between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

* * * * *

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

* * * * *

SEC. 13. Definitions.—

(a) When the terms "employer," "employee," and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 622.

IN THE

Supreme Court of the United States

October Term, 1947.

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - - Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, - - Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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Of Counsel.

April 13, 1948.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 622.

WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, - *Respondent.*

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Telegraph Company realizes that the odds are against a petition for rehearing on a petition for a writ of certiorari. However, such petitions for rehearing have been granted by this Court.[1]

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[1]Robinson v. United States, certiorari denied 324 U. S. 789, rehearing granted and certiorari granted 324 U. S. 808; Zap v. United States, certiorari denied 326 U. S. 777, rehearing granted and certiorari granted 326 U. S. 802; Gardner, Trustee v. New Jersey, certiorari denied 328 U. S. 850, rehearing granted and certiorari granted 328 U. S. 876; Hickman v. Taylor, certiorari denied 327 U. S. 808, rehearing granted and

(*Footnote continued on following page.*)

A decision by this Court on the question of whether or not the Telegraph Company can employ "independent contractors" in small towns where there is not enough telegraph business to warrant a Company office is of importance not only to the Telegraph Company but also to such small towns throughout the country. It will determine whether or not such small towns can continue to have the benefit of efficient nation-wide telegraph service.

With reference to the effect on the Telegraph Company of the competition of long distance telephone and air mail the Federal Communications Commission, in June, 1946, Docket No. 7445 (R. 817), in granting the Telegraph Company a rate increase, said:

> (R. 819) "Another important factor which leads us to the conclusion that Western Union is definitely erring on the side of optimism in its 6 per cent estimate is the factor of *competition*[2] from other communication services. Telephone toll and teletypewriter exchange facilities and services are rapidly being improved and expanded, and substantial reductions in rates for these services have only recently been made. * * *"

certiorari granted 328 U. S. 876; 149 Madison Avenue Corp. v. Asselta, certiorari denied 329 U. S. 764, rehearing granted and certiorari granted 329 U. S. 817; Silesian American Corp. v. Markham, certiorari denied 329 U. S. 730, rehearing granted and certiorari granted 330 U. S. 852; Sioux Tribe of Indians v. United States, certiorari denied 329 U. S. 758, rehearing granted, order denying certiorari vacated, judgment vacated and case remanded 329 U. S. 684; Interstate Natural Gas Co., Inc. v. Federal Power Commission, certiorari denied 329 U. S. 802, rehearing granted and certiorari granted 330 U. S. 852; Alaska Juneau Gold Mining Co. v. Robertson, certiorari denied 331 U. S. 825, rehearing granted and certiorari granted 331 U. S. 793, Judgment of reversal of CCA modified to provide that on remand to the district court that court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947; Estin v. Estin, certiorari denied 332 U. S. 760, rehearing granted and certiorari granted 332 U. S. 840.

[2]Italics ours throughout.

(R. 820) "The air mail service, which is *another main competitor* of Western Union, is also being speedily improved. * * *"

With reference to economies practiced by the Telegraph Company, the Federal Commission said:

(R. 820) "According to the testimony, Western Union is presently engaged in a strict economy program, in an attempt to cut costs. There are definite limits to such a program, however, because of the need of meeting service demands. There were indications in the record that service is already beginning to suffer from the economies that have been imposed."

In showing that rate increases are not the answer, the Federal Commission said:

(R. 822) "* * * Moreover, as has been suggested, even if the rate relief sought herein is granted, the financial emergency now facing Western Union may soon recur, and in that event, further rate increases presumably will offer no solution, but may only intensify the company's difficulties, in view of its need to meet the rate and service competition of other means of rapid communication. * * *"

As to the Telegraph Company's nation-wide services and the need for such services, the Commission said:

(R. 822) "We may summarize very simply our findings on Western Union's revenue needs: We are of the opinion that Western Union will need substantially more revenue than it is now

requesting if it is to continue in operation as a solvent enterprise, and provide satisfactory service on a comprehensive Nation-wide basis."

* * * * * * *

(R. 823) "If there is a real need in this country for the service which the Western Union can provide, something more basic must be done, and done soon, to meet the problem of developing a strong and efficient domestic telegraph system in the United States."

Our reason for making the above quotations is to point out that air mail and long distance telephone competition has so reduced the telegraph business that unless the Telegraph Company can use "independent contractors" in small towns it cannot continue to furnish satisfactory telegraph service to such small towns.

Congress did not intend to prevent the use of "independent contractors" employed in "normal business relationships."

United States v. *Silk,* 331 U. S. 704.

(P. 714) "* * * There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. * * *"

Take Georgetown,[3] Kentucky, as a sample, because the persons involved are few, the facts are simple and there has never been a hint that any of the mistakes emphasized in the opinion of the court below (R. 1217, footnote) had ever happened at Georgetown:

[3]The second Kentucky town named in the injunction (R. 88).

The total of incoming and outgoing telegrams at Georgetown is only about 37 or 38 per day (R. 680). The gross revenue from telegraph business at Georgetown is only about $15.00 per day (R. 681). Obviously, with so little telegraph business at Georgetown, the Company cannot have its own office with the attendant expenses of rent, light, heat, water, wages, telephone, janitor service, etc.

The only way Georgetown, Kentucky, can have efficient telegraph service is for the Company to obtain "the services of another to perform a portion of production or (and)[4] distribution."

In October, 1942, the Telegraph Company contracted with Mr. L. S. O'Dell as its 9-A agent at Georgetown under a written contract which is still in effect (R. 1163). Previous to that time, a drug store had been the 9-A agent (R. 1163).

Since 1925, Mr. O'Dell has been sales agent for Buick and Pontiac cars and G.M.C. trucks; he owned a garage (R. 1163) and was ticket agent for the Greyhound Bus Lines (R. 1173); he also owned a soft drink, candy, ice cream and cigarette business (R. 1165) such as is usually found at bus stations. The telegraph, bus and confectionery businesses are all conducted at two adjoining counters in one side of the automobile showroom (R. 678-679).

Previous to the time the Telegraph Company made the 9-A agency contract with Mr. O'Dell, a Miss Green had been attending to the bus agency and confectionery counter. These took only a part of her time so

[4]Parenthesis supplied.

that she was able to take on the main part of the telegraph work. When Miss Green is out for lunch or downtown or on vacation, a bookkeeper (Miss Inman) from the garage takes over the telegraph, bus ticket and confectionery work (R. 683).

Miss Green (R. 683) and Mr. O'Dell (R. 1165) both said that he attended to the telegraph, bus and confectionery business "before she gets there in the morning or after she leaves at night" and also that he attended to these three businesses every other Sunday (R. 1165).

The gross revenue from the bus business is approximately $1,000.00 in each eight-day period (R. 699) or about $125.00 per day. The gross revenue from the confectionery is $12.00 to $15.00 per day (R. 679) and from the telegraph business about $15.00 per day.

As has been shown, Miss Green was working for Mr. O'Dell when the 9-A agency contract was signed. Her hours per day and per week were substantially the same ever since she started work for Mr. O'Dell (R. 674). Both Miss Green and Mr. O'Dell testified that the Telegraph Company had nothing to do with her having been employed, nothing to do with fixing her hours of work or her compensation or her vacation, etc. All of these matters were done by Mr. O'Dell personally. Miss Green kept no records or forms for the Telegraph Company except the original of outgoing messages (R. 701).

She was told at the beginning "that if at any time I had any trouble that the Lexington operators were

always willing to help" (R. 677). Miss Green has read the rules in the tariff book only twice in four years. No Western Union representative ever told her she had to conform to the rules nor has she ever been given any test of any kind to see whether she was familiar with all of the rules (R. 682). She has never been reprimanded, disciplined or penalized in any way for being unfamiliar with the Company rules (R. 683). When visits were made to Georgetown by representatives of the Telegraph Company, the conversation was whether or not she was getting along all right and if she had any questions (R. 684-685). She reads the circulars from the Telegraph Company only if they "look interesting" (R. 686).

There is a separate cash drawer for bus tickets and telegrams. Miss Green is paid from the bus cash drawer because it started that way before Mr. O'Dell became the Telegraph Company agent (R. 697). She has never been paid by the Telegraph Company. The money from the telegraph business is deposited in the "O'Dell Agency" account in the bank (R. 677). The Telegraph Company has no control over this bank account and no way of withdrawing any deposit in that account (R. 691).

We started to copy all of the testimony of Miss Green, who was put on the stand by the Administrator, and the testimony of Mr. O'Dell, a witness for the Company, and file it as an appendix to this petition, but decided against such an idea. The testimony is not long (Miss Green, R. 673-719; Mr. O'Dell, R. 1162-1169). The Court is respectfully requested to glance through it. It was a perfect independent contractor

relationship within all of the cases on the subject by this Court.

The order in this case (R. 88-89) enjoins the Telegraph Company at Georgetown from suffering or permitting Mr. O'Dell, Miss Green and Miss Inman[5] "to be employed in the operation or for the purpose of operating defendant's facilities or equipment used in carrying on its telegraph business" unless each of them "receive wages for the time required to be present and available for such service as well as actually engaged therein at rates less than * * *" the minimums fixed by the Fair Labor Standards Act. The injunction also provides the same for overtime and for the keeping of time records at Georgetown by the Telegraph Company.

In other words, the lower court held that Mr. O'Dell, Miss Green and Miss Inman were employees of the Telegraph Company and not independent contractors.

This means that if Georgetown is to continue to receive efficient telegraph service, the Telegraph Company must itself pay or require Mr. O'Dell to pay Miss Green, Miss Inman and himself the minimum in the Act for the time they are selling bus tickets or waiting on the confectionery counter customers as well as for the time they are actually doing telegraph work.

It is impossible to see how the order of the lower court can be obeyed as to Mr. O'Dell. He does not receive wages in any sense of the word. His income depends upon the net income from his automobile and truck sales agency, garage, bus ticket, telegraph and

[5]Not by name, of course.

confectionery work. He either makes profits or sustains losses from the net result of the combination of all of his various businesses, which can only be ascertained at the end of any fiscal period.

The judgment of the lower court ignores the realities of the situation. Mr. O'Dell, to say the least, is a "small businessman" (331 U. S. 704, 719). He is a successful one and it is unrealistic for the judgment herein to hold that he is in any sense an employee of the Telegraph Company.

While a few mistakes were made in the early stages at three towns, it cannot be successfully denied that at the time of the trial each of the other seven towns in Kentucky named in the judgment had clearly bona fide independent contractors.

The question therefore narrows down to whether or not the Telegraph Company can use "independent contractors" for a part of its business in order to serve small communities where the revenue would not support a Company office.

WHEREFORE, we respectfully ask that the petition for writ of certiorari be granted.

Respectfully submitted,

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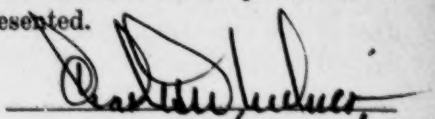
April 13, 1948.

Certificate.

I hereby certify that the foregoing petition is presented in good faith and not for delay and that the petition is restricted to substantial grounds available to petitioner although not previously presented.



Charles W. Milner.